Supreme Court, U.S.
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No. 96-8653

In The

Supreme Court of the United States

October Term, 1997

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the introduction at a joint trial of a redacted confession of a nontestifying codefendant deprive Petitioner of his Sixth Amendment right of confrontation?

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ARGUMENT

THE INTRODUCTION OF A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT.

Respondent contends that Petitioner was not deprived of his constitutional right to confront his accusers under the Sixth Amendment when a nontestifying codefendant's confession, redacted to exclude Petitioner's name by substituting the words "deleted" and "deletion," was introduced at their joint trial accompanied by an instruction to the jury not to consider the redacted confession to the nontestifying codefendant against Petitioner. (Res. Br. 11) According to Respondent, "whenever a confession is redacted to eliminate the defendant's name or its functional equivalent, *Bruton [v. United States*, 391 U.S. 123 (1968)] and *Richardson [v. Marsh*, 481 U.S. 200 (1987)] are satisfied." (Res. Br. 10).

Respondent urges the Court to adopt the "facial implication" doctrine. While the facial implication doctrine has a certain "simplistic appeal,"[1] the doctrine

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[1] The Court of Appeals of Maryland did not adopt a version of the "facial implication" doctrine. (Res. Br. 8) The Court of Appeals rejected the facial implication doctrine "in its most pristine form" (J.A. 100) The Court noted that "while the facial implication doctrine has simplistic appeal, redacted confessions with 'neutral pronouns may still prove impossible to thrust out of mind.' " (J.A. 99) The Court of Appeals adopted a version of the "contextual" or "evidentiary linkage" approach. Maryland's highest court held that "a *Bruton* violation occurs when a codefendant's confession, either facially, *or by compelling an inevitable inference*, inculpates a nonconfessing defendant."

should be rejected by the Court because, in practice, it affords little, if any, protection against the "substantial threat" to a defendant's right to confront the witnesses against him posed by the introduction, at a joint trial, of a redacted confession of a nontestifying codefendant.

A. A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT WHICH, DIRECTLY OR INDIRECTLY, IMPLICATES A DEFENDANT SHOULD NOT BE ADMITTED AT A JOINT TRIAL.

In urging the Court to adopt the "facial implication" doctrine, Respondent all but ignores the Court's historic unwillingness to allow a statement of a codefendant/accomplice which implicates a defendant to be admitted into evidence unless the codefendant/accomplice is subject to the scrutiny of cross-examination. Since "*Douglas [v. Alabama*, 380 U.S. 415, 419 (1965)], the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee v. Illinois*, 476 U.S. 530, 541 (1986) Such statements "have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Id.*, 475 U.S., at 541. As

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(J.A. 105) (Emphasis added) The Court, applying the "contextual" approach, affirmed Petitioner's conviction because "while we agree that the jury *could have* reasonably inferred that one of the deleted names belonged to Gray, that inference was not compelled." (J.A. 105)

the Court in *Lee* observed, the "truth finding function of the Confrontation Clause "is *uniquely threatened* when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Id.*, 476 U.S., at 541 (Emphasis added) *Cf., Williamson v. United States*, 512 U.S. 594, 601 (1994).[2]

The confession of a nontestifying codefendant which, despite the redaction of the defendant's name, directly or indirectly,[3] implicates the defendant is also "presumptively unreliable" and no less "inevitably suspect." Given the fact that a nontestifying codefendant's confession which either, directly or indirectly, implicates a defendant is "presumptively unreliable," its introduction at joint trials without the benefit of cross-examination should likewise be limited.[4]

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[2] *Compare, Bourjaily v. United States*, 483 U.S. 171 (1987) (because hearsay rules and the Confrontation Clause are generally designed to protect similar values, separate reliability inquiry not required where evidence falls within firmly rooted coconspirator exception to hearsay rule).

[3] In determining whether a redacted confession of a nontestifying codefendant actually implicates a defendant, the trial court must consider the confession in the context of the other evidence to be presented at trial. *Cf. Williamson*, 512 U.S., at___. Whether a statement is self-inculpatory or not can only be determined by viewing it in context); *Bourjaily*, 483 U.S., at 179 (evidence gains probative force from surrounding evidence)

[4] Had Petitioner been afforded the opportunity to cross-examine codefendant Bell, he could have shown that Bell's confession was motivated by his desire to implicate others and thereby lessen his own blameworthiness. *See, Davis v. Alaska*, 415 U.S. 308 (1974).

A redacted confession of a nontestifying codefendant which, directly or indirectly, implicates the defendant remains "powerfully incriminating." While "specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind," *Richardson*, 481 U.S., at 208, a redacted confession that, unlike the confession in *Richardson*, not only reveals the existence of another participant, but, directly or indirectly, implicates the defendant is also "vivid" and "difficult to thrust out of mind."

Codefendant Bell's redacted confession illustrates just how "vivid" inferential incrimination can be.[5] Bell's

[5] Respondent, for the first time asserts that Petitioner "voiced no objection to the method of redaction directed by the trial court, despite ample opportunity to do so." (Res. Br. 19) The method of redaction was selected by the trial judge. (J.A. 8) Thereafter, when the trial judge explained that "there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me," defense counsel reminded the trial judge that "there are not five or six people on trial." (J.A. 8) When defense counsel argued that admission of Bell's redacted confession "makes the case against Mr. Gray stronger . . . [b]ecause two people were named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized," the trial judge simply responded "I understand your position. Your motion for a severance is denied." (J.A. 9) Although defense counsel did not suggest an alternative method of redaction, she clearly did not acquiesce in the trial court's ruling. Respondent did not raise a question of preservation in its brief in opposition or, for that matter, in the Court of Special Appeals of Maryland or the Court of Appeals of Maryland. *See*, Supreme Court Rule 15.3 which provides that "any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

redacted confession did more than "merely inform the jury that others, besides the declarant, were at the scene and involved in the incident." (Res. Br. 19) The redacted confession informed the jury that two persons whose identity were known to codefendant Bell and "several others persons" were involved in the beating of Stacey Williams. Thus, the jury's attention was drawn to Petitioner not only by the use of the terms "deleted" and "deletion," but also by the fact that two names had been deleted from Bell's confession and only three perpetrators, i.e., Bell, Petitioner and Tank, had been identified by name by other witnesses.[6] As the Court of Special Appeals of Maryland observed in reversing Petitioner's conviction, "in the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that [Petitioner] was one of those involved. Indeed, with Tank dead, the jury was

[6] Respondent is also in error when it contends that "unlike the situation in *Bruton*, where the jurors were confronted with the defendant's name and then told to 'wipe it from their brains,' *See* 391 U.S. at 129, Gray's jury was not called upon to ignore a vital piece of evidence to which its attention had just been directed." (Res. Br. 22) The jurors' attention was inevitably drawn to the terms "deleted" and "deletion." The use of these terms, in and of themselves, called upon the jury to ignore a vital piece of evidence. The terms "deleted" and "deletion" cannot be construed as "neutral, non-identifying terms." *See*, United States Amicus Br. 16. The admission of Bell's redacted confession had an "immediate and dramatic impact" upon the jury. *See*, United States Amicus Br. 19.

"virtually invited . . . to use [Petitioner]'s name to 'fill in the blanks.' "[7] (J.A. 83-84)

B. A JURY CANNOT BE RELIED UPON TO DISREGARD A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT WHICH, DIRECTLY OR INDIRECTLY, IMPLICATES A DEFENDANT EVEN IF INSTRUCTED TO DO SO.

Respondent asserts that both before and after *Richardson*, the Court has approved of the use of limiting instructions in "several analogous, and even more difficult, situations in which juries routinely are called upon and expected to follow instructions to consider evidence for one purpose but not another, or against one defendant but not a codefendant." (Res. Br. 23) While the Court has approved of the use of limiting instructions in a variety of situations, the situations are neither "anologous" to nor "more difficult" than the situation presented in this case.[8]

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[7] In affirming Petitioner's conviction, the Court of Appeals of Maryland concluded, "the jury *could have* reasonably inferred that one of the deleted names belong to [Petitioner]." (J.A. 105)

[8] In *Richardson*, 481 U.S., at 211, the Court recognized that the rule "that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant and the criminal process." The effectiveness of limiting instruction has also often been questioned. *Cf., Tome v. United States*, 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (jurors unlikely to follow instructions limiting use of prior inconsistent statements to a rehabilitative purpose rather than for their substantive value); *Honda Motor Co. v. Obert*, 512 U.S. 415, ___ (1994) (concern expressed that jury will not follow

The Court has approved the use of limiting instructions, but only to further either the legitimate truth-finding function or fairness of a trial. *Cf., Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) (admission of evidence in capital case regarding defendant's prior death sentence did not deprive defendant of a fair sentencing proceeding where if the jurors followed the trial court's instruction the evidence should have had little – if any – effect on their deliberations); *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (prejudicial effect of relevant similar crimes evidence limited where jury instructed that similar crimes evidence is to be considered only for the limited purpose for which admitted); *Tennessee v. Street*, 471 U.S. 409, 414-416 (1985) (defendant's rights under Confrontation Clause not violated by introduction of accomplice's incriminating confession for purpose of assessing truthfulness of defendant's claim that his own confession was coerced); *Harris v. New York*, 401 U.S. 222 (1971), (statements elicited from a defendant in violation of *Miranda* can be introduced to impeach defendant's credibility, even though statements are inadmissible as evidence of his guilt);[9] *Watkins v. Sonders*. 449 U.S. 341, 347 (1981)

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instruction to limit punitive damages and will, instead return a lawless, biased, or arbitrary verdict); (*Krulewitch v. United States*, 366 U.S. 440, 453 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be a fiction").

[9] Respondent's reliance on *Harris* is clearly misplaced. (Res. Br. 22-23) Harris, by electing to testify on his own behalf, placed his credibility in issue. His confession, which had been elicited in violation of *Miranda*, but which otherwise satisfied legal standards of trustworthiness, was then admitted for the limited

(pretrial hearing not required where the propriety of identification procedures have been questioned and where the reliability of the identification can be tested by cross-examination).

The Court has not approved of the use of instructions to limit the prejudicial effect of "presumptively unreliable" evidence. Admitting such evidence does not further either the legitimate truth-finding function or fairness of a trial. In truly "analogous" situations, the Court has held that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S., at 135. *See, Jackson v. Denno*, 378 U.S. 368 (1964) (jury could not be relied upon to follow instructions to disregard an involuntary confession); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (jury could not be relied upon to follow instructions to disregard admission of a prior criminal conviction which is constitutionally infirm).

Given "the practical and human limitations of the jury system," a jury cannot be relied upon to follow an instruction to disregard a redacted confession of a nontestifying codefendant which, directly or indirectly, inculpates a defendant any more than it can be relied upon to

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purpose of impeaching his credibility as a witness. The jury was instructed to consider Harris' confession for that limited purpose. The jury was not instructed, as was the jury in this case, to *disregard* the confession. The "consequences of failure", to disregard an unreliable confession of a codefendant are clearly more "vital" than the "consequences of failure" to limit the use of a defendant's own trustworthy confession. *See, Bruton*, 391 U.S., at 135.

disregard a confession which inculpates the defendant by name. Once the jury has entered "onto the path of inferen[tial]" incrimination, the risk that the jury will not likely obey the instruction to disregard the evidence is substantial.

C. "POLICY CONSIDERATIONS" ALONE DO NOT COMPEL ADMISSION OF A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT WHICH, DIRECTLY OR INDIRECTLY, IMPLICATES A DEFENDANT.

Respondent urges the Court to adopt "the facial implication" approach because of several "important policy considerations." (Res. Br. 13-18) According to Respondent, the "facial implication" approach should be adopted because: (1) "whereas facial incrimination is curable by redaction that eliminates references to coparticipants, there is no effective way to redact a confession that is incriminating to the nonconfessing codefendant only when tied to other evidence" (Res. Br. 14); (2) "if a contextual implication approach were used, then a trial judge who is asked to rule on motions to exclude the confession or to sever the trials would be burdened with the task of considering not only the confession itself but other evidence, which typically will not yet have been presented": (Res. Br. 14); (3) "prohibiting the use at joint trials of confessions that are not facially incriminating would result in fewer joint trials, thereby exacting a significant toll on the trial's participants and society as a whole" (Res. Br. 15); and (4) "to forgo the use of codefendant confessions altogether in such situations is too dear a price to pay in view of 'society's compelling interest in

finding, convicting, and punishing those who violate the law.' " (Res. Br. 17)

While these policy considerations are "important", they are far from compelling particularly when balanced against a defendant's constitutional right of confrontation. *Bruton*, 391 U.S., at 135. *See generally*, Judith L. Ritter, *The X-Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 Vill. L.Rev.___ (1997).

First, a confession of a nontestifying codefendant *can* be redacted so that it is not incriminating to the defendant in the context of other evidence at trial. Incrimination, not just facial incrimination, is curable by redaction.[10] *See*, Pet. Br. 14 n.15. If a confession is redacted so that is eliminates any reference by the nontestifying codefendant to specific individuals, i.e., Kevin or "deleted", then the confession ordinarily will not be incriminating to the defendant. The confession need not be redacted to eliminate all references to another person, but only to specific, identifiable persons.

Second, a trial judge is often required to consider proffered evidence in context before ruling on its admissibility. *Cf. Williamson*, 512 U.S., at ___ (Whether a statement is self-inculpatory or not can only be determined by viewing it in context); *Bourjaily*, 483 U.S., at 175 (Before

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[10] Under the "facial implication" doctrine, a redacted confession of a nontestifying codefendant, which *in context* clearly and unequivocally implicates a defendant, can be admitted into evidence. As the Maryland Court of Appeals observed, under this approach, "the act of redaction becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*. . . . " (J.A. 100)

admitting a coconspirator's statement over an objection that it does not qualify under the coconspirator exception to the hearsay rule, court must be satisfied that the statement actually falls within the definition of the rule and there must be evidence that there was a conspiracy involving the declarant and the nonoffering party and that the statement was made in the course of and in furtherance of the conspiracy). The task is not overly burdensome. In this case, for example, the trial judge simply asked the prosecutor "to tell the Court what you expect your evidence to show, apart from Mr. Bell's statement?" (J.A. 5) The prosecutor then presented a brief summary of the evidence pertaining to the identity of the alleged perpetrators. There was no need for an extensive pretrial hearing.

Third, limiting the use of redacted confessions to those that neither directly, nor indirectly, inculpate the nonconfessing defendant need not result in fewer joint trails. At a joint trial, the prosecution would still be able to use the redacted confession, but only against the defendant who actually confessed. If there is no way to redact a confession, without distorting the significance of the confession with respect to the confessing defendant, then severance would be required.

Finally, to forgo the use at a joint trial of a redacted confession of a nontestifying codefendant which, directly or indirectly, inculpates a defendant is not too dear a price to pay if severance is the only means to insure that both, rather than just one defendant, receives a fair trial. While the Court in *Richardson*, 481 U.S., at 209, indicated a "preference" for the joint trial of defendants, "the Court should be mindful of the serious risks of prejudice and

overreaching that are characteristic of joint trials. . . ." *Zafiro v. United States*, 506 U.S. 534, 545 (1993) (Stevens, J., concurring)

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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